2007

State of Utah v. Daniel Steven White : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH Plaintiff and Appellee, v. DANIEL STEVEN WHITE Defendant and Appellant.	Case No. 20070231

REPLY BRIEF OF APPELLANT

Appeal from Two Convictions of Dealing In Harmful Material To A Minor pursuant to Utah Code Ann. § 76-10-1206(1) in the Fourth District Court, Utah County, Utah, the Honorable James Taylor, Presiding.

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HAD THE COURT FOLLOWED RULE 11, THERE WOULD HAVE BEEN NO GUILTY PLEA THEN AND THUS, THERE CAN BE NONE NOW

On January 18, 2006, the Court said:

THE COURT: Okay. Count III is dealing in harmful material to a minor, a third-degree felony. A third-degree felony is punishable by incarceration in the Utah state Prison for an indedeterminate period of time not to exceed five years, together with a fine up to $5,000 and/or both. Do you understand that, sir?

MR. WHITE: Yes, sir.

THE COURT: Okay. It alleges that you, or or about or between June 1, 2005 and October 1, 2005 in Utah County, Utah, knowing that a person was a minor, or having failed to exercise reasonable care in ascertaining the proper age of a minor, did intentionally distribute or offer to distribute, exhibit or offer to exhibit to a minor any material harmful to minors, or intentionally produce, present or direct any performance before a minor that was harmful to minors, or intentionally participated in any performance before a minor that was harmful to minors. Do you understand that charge, sir?

MR. WHITE: Yes, sir, R. 115, pp. 3-4.

> Rule 11 of the Utah Laws of Criminal Procedure requires:
> (e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:
>
> * * *
>
> (e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;
>
> * * *
>
> (e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

The factual basis the prosecutor stated was:

MS. KELLY: ..Between June 1st of 2005 and October 1st of 2005 the defendant was engaged with – in a sexual relationship with a 14-year-old girl in Highland, which is in Utah County. As part of that relationship he had her take pictures of himself while sexually aroused, and they are pornographic – those pictures are pornographic in nature.

THE COUT: Okay.

MS. KELLY: She not only took the pictures. She also saw them, viewed them.

THE COURT Okay.

MS. KELLY: Exhibited them to her.

THE COURT: Is that what happened on those occasions, sir?

MR. WHITE: Yes, sir, R. 115, pp. 7-8.

The record is void of any recital of a plea bargain leading to the guilty plea. In fact, however, there was a plea bargain. The terms were, according to Mr. White, that in consideration of his guilty plea as stated above, he would serve no time:

> 2. On November 23, 2005 I appeared for the preliminary hearing in the subject case at the appointed time. The complainant, Chelsea Wright did not appear until three and one-half hours after the appointed time. My attorney, Anthony Rippa, did not move to dismiss the case, but waited until Chelsea Wright finally appeared with her mother.
>
> 3. In the meantime, the prosecutor, Donna Kelly, offered to drop the two first degree felony rape charges were I to plead guilty to the two third degree felony charges of distributing harmful material to a minor.
>
> 4. Mr. Rippa asked me whether I would so agree. I said that I would so long as there were no jail and no registration as a sex offender. Mr. Rippa spoke

to Ms. Kelly, and told me that there would be no jail. She researched the law and found that conviction for the two third degree felonies would not require sex offender registration.

5. Given that representation, I agreed to the plea bargain. Later, after I substituted Thomas M. Burton for Mr. Rippa I learned that my pre-sentencing report recommended that I serve one year in jail. I further learned that Ms. Kelly meant that there would be no prison time, not any jail time.

6. During this time, I was trying to reach my California attorney, Thomas M. Burton, but he did not return my calls. I, therefore, decided to go along with the disposition that my attorney, Mr. Rippa, recommended.

7. Upon entering my guilty plea, I did not distinguish between prison and jail, and was under the impression I would not have to spend any time locked up, let alone a year. I entered the plea because Mr. Rippa told me to do so, and that it was a good deal. I have learned that plea bargain is not the agreement that I thought that I was making.

* * *

9. Had I known that there would be a prospect of spending a year in jail pursuant to my guilty plea, I would not have agreed to plead guilty, R 107-109.

At sentencing, Donna Kelly, the prosecutor, admitted that there was a plea bargain and that the State was not seeking prison time:

THE JUDGE: Ms. Kelly?

MS. KELLY: Your honor if I could just review what the plea statement in advance of plea says.

THE JUDGE: the statement in advance of plea agreement the statement in advance of plea says plead guilty to both charges and refer matter to adult probation and parole for sentencing and recommendation. That's it.

MS KELLY: I had agreed with Mr. [Rippa] his previous counsel not to recommend a prison term. But there was, according to my memory there was no agreement on jail in the county jail. I was free to recommend that.

THE JUDGE: It doesn't, it doesn't say. I just says refer for Adult Probation and Parole recommendation. So whatever, that all that's in the memorandum. Whatever, I'm at your mercy as though what you agreed, I don't have whatever –

MS. KELLY: Okay. I'm willing to concede that we agreed not to recommend a prison term, R. 255, p. 6-7. (emphasis added)

Had the Court sentenced Daniel White as recommended, he would have served no more, and perhaps less, than one year in jail. Daniel White

challenged the draconian methods of the diagnostic unit and CW's family wanted prison. The Court then exhibited anger at Mr. Burton for objecting to the diagnostic unit, and his seeking to keep the Court focused on the guilty plea issue, not the dismissed charges in exchange for the guilty plea. The Court then sentenced the defendant to 5 years in prison, R. 255, pp. 7-12.

Although the Court observed that the plea agreement was not recited on the record, and although Ms. Kelly admitted that she would not have requested prison time under that agreement, the Court used the absence of the plea agreement to sentence the defendant to prison. Mr. White plead guilty to a bargain of no incarceration and instead got a year in prison. Had the Court followed Rule 11, there would have been no guilty plea. That is a sufficient ground for the plea to be withdrawn and for the sentence to be struck from the record.

THE FACTUAL SUPPORT FOR THE GUILTY PLEA DOES NOT CONSITUTE THE CRIME OF PORNOGRAPHY FOR WHICH THE DEFENANT COULD BE PUNISHED

The two pictures taken by CW of defendant in his bedroom doing nothing but holding his penis are not pornographic as a matter of law. There is no evidence that the organ is turgid since most of it is hidden from view. It could just as well be an anatomical pose.

The Utah Supreme Court in *City of St. George v. Turner*, 860 p.2d 929 (1993) reviewed two drawing on appeal. "The two drawings that form the basis for the obscenity charge are sprayed in the bottom left-hand corner of one of the sheets. The first drawing depicts a naked woman reclining with her legs spread toward the viewer. The woman's pubic area consists of three or four black paint spots. The second drawing appears to be a close-up of the female genitalia, although it may be subject to different interpretations. The two crudely and indistinctly drawn depictions are not readily apparent from among the melange of other random drawings, phrases, and symbols. Above the drawing of the woman are the statements 'why not let someone else think for you?' and 'tuna factory xxx.' To the left of the second drawing is a very small sign stating, 'tunnel of love.' A faint yellow arrow points from the sign to the female genitalia. In some proximity to the drawings are the statements 'keep out,' 'not yours,' and 'its mine all mine.'

The Court found the images not obscene:

> Clearly, Miller and its progeny allow government to regulate and ban the commercial exploitation of hard-core pornography. However, the drawings at issue here do not even come close to "'public portrayal of hard core sexual conduct for its own sake and for the ensuing commercial gain.'" Jenkins v.

Georgia, 418 U.S. 153, 161, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) (emphasis added) (quoting Miller, 413 U.S. at 34, 93 S.Ct. at 2620). First, the drawings were not rendered for the purpose of commercial marketing. Second, mere nudity does not constitute hard-core sexual conduct. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); Jenkins v. Georgia, 418 U.S. 153, 161, 94 S.Ct. 2750, 2755--56, 41 L.Ed.2d 642 (1974).

Before "sexual conduct" can be obscene, there must be some degree of sexual activity. The lewd exhibition of the genitals in a manner that suggests some kind of sexual action or conduct may constitute hard-core sexual conduct, but simple nudity without more is not lewd conduct for the purpose of determining legal obscenity.(fn3) In United States v. Palladino, 490 F.2d 499, 501 (1st Cir.1974), the court held that pictures of naked men that revealed no bodily contact, exotic positions, or sexual arousal did not constitute a lewd exhibition of the genitals. Similarly, in Huffman v. United States, 470 F.2d 386, 401 (D.C.Cir.1971), the court held that the First Amendment protects the depiction of nude women even "where the pictures focus upon the pubic areas and poses

are struck in such a way as to emphasize the female genitalia." See also Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1365 (5th Cir.1980).

In Sovereign News Co. v. Falke, 448 F.Supp. 306, 396--97 (N.D.Ohio 1977), the court observed: [T]he line drawn between hard core pornography which is subject to restriction, and the depictions and descriptions of sexual conduct which may not be restricted, depends on the amount of physical activity which is connected with the sexual depiction or description. If the human subject of the depiction or description is engaged in sexual action, whether by himself or herself, or with another, then the material is "hard core" sexual conduct, as the Supreme Court used the term, and it may be banned. When, however, the description or depiction is of sexual conduct without a significant action element, i.e., the sexual conduct is passive in nature, then the description or depiction is not "hard core" and it may not be banned or restricted. (Emphasis in original.) A similar observation was made in People v. Ventrice, 96 Misc.2d 282, 408 N.Y.S.2d 990, 992--93 (N.Y.Crim.Ct.1978): Since lewdness cannot be presumed from the mere fact of nudity, there must be a

> showing of lewd conduct from which the intention to act in a lewd manner can be drawn....Where genitalia have been graphically portrayed, together with some indication of sexual activity, e.g., sexual intercourse, masturbation or sodomy, absent social justification or excuse, the material in question has been held obscene. However, the graphic representation of genitalia, without more, is not a violation of the obscenity statute.... It is [the] graphic depiction or simulation of sexual conduct that establishes the line beyond which lies obscenity, at pp. 925-936.

There is, in the two photographs in this case, in which the defendant is wholly passive, nothing that supports a two felony convictions and a year in prison. More supported by the facts would have been a guilty plea to Class B misdemeanor lewdness under §76-9-702(1), or a Class A misdemeanor sexual battery under §76-9-702(3). Felony pornography, it is not.

THE STATE HAS UNCONSITUTIONALLY PUNISHED THE DEFENDANT NOT FOR THE PORNOGRAPHY COUNT HE PLEAD GUILTY TO BUT FOR THE RAPE COUNTS THAT WERE DISMISSED

The state had no discretion whatsoever to punish Defendant as a sexual predator and treat him as a danger to society. But for the

unjustified, unsupported, and biased report of Dr. Fox, was no legitimate proof of that in the record. Defendant was not advised that by pleading guilty to the pornography count he would be evaluated with the ridiculous and unconstitutionally invasive plethysmograph, as if he plead guilty to the rape charges or had molested a small, innocent child. Nor was he ever advised that he would be placed in the so-called "diagnostic unit" that is even more medieval than the plethysmograph. The ninety-day term obviously was aimed more at punishment on the pretext of someone's demented view of recidivism than at diagnosis, which is a one-day procedure when properly conducted.

The State claims that the defendant's objection to the unit was not preserved. That is because neither the defendant nor his counsel could not have imagined what it involved. As soon as its misnomer was apparent, Defendant strongly objected and was just as strongly rebuked by the Court, R. 209, 212, 253, 254.

In *National Association of Social Workers v. Harwood*, 69 F.3d 622, 625-29 (1st Cir. 1995), the court raised six factors justifying adjudication of issues even though not preserved below: 1) whether the new argument raises a pure issue of law that could be decided without further fact-finding; 2) whether the argument raises an issue of constitutional magnitude; 3) whether the argument is 'highly persuasive' and the failure

to consider it would threaten a miscarriage of justice; 4) whether considering the argument would work any special prejudice or inequity to the other party; 5) whether the party's failure to raise the argument below seemed inadvertent or was done deliberately to yield a tactical advantage; and 6) whether the argument implicates matters of 'great public moment,' such as federalism, comity and respect for the independent democratic institutions.

In this case, the defendant and his counsel were shocked to find a 90-day confinement under death-row conditions interspersed with coercive brainwashing group techniques to dehumanize prisoners into compliant confessors of gross iniquities. The cardinal sin in all such settings is failure to cooperate. The State Prison appears to be without oversight or examination. Defendant wants a full investigation of its protocols and techniques for so-called sex offenders.

Defendant wanted an independent evaluation by someone of his choice so as to rebut Dr. Fox's evaluation. There was no justification, other than the Court's pique, to send Defendant to prison for another state "evaluation", regarding which, if he did not cooperate, he would be sentenced to five years in prison. To plead guilty to light charges and then be punished for heavy dismissed charges was grossly unfair and impermissibly excessive.

In addition, the year the defendant served in prison was disproportionate to anything he had done, and was thus unconstitutional. The 8th Amendment applies not only to cruel and unusual punishment, but also to excessive punishment. *Kennedy v. Louisiana*, 554 U.S. ____ (2008) held that a state could not punish by death the crime of raping a child. "...capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."

The Court below met Defendant's challenges with retributive and excessive punishment.

THE PROSECUTION'S NOT PRODUCING EXPRESSLY REQUESTED VIDEO RECORDINGS OF THE STATE'S TWO INTERVIEWS WITH THE ALLEGED VICTIM WAS PREJUDICIAL TO MR. WHITE'S DEFENSE

Not producing evidence that the defendant had requested in writing suggests that the State was deliberately withholding the evidence to its advantage, or it would have produced the evidence as required by law. Rule 16 (a)(4) requires the production of "evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment".

The withheld video interview tapes showed that the victim instigated any contact between them and was adamant about not revealing Defendant's identity. She did so only after being severely pressured by Detective Turner. Such evidence tended to mitigate the guilt of the defendant.

Medel, cited by the State, does not control this issue as that case dealt with post-conviction relief after a guilty plea to multiple felonies. The question facing Mr. White, was whether he should plead guilty to a pornography charge, as was before the court in *Tillman v. State* 128 P.3d 1123 (2006) where the State had failed to disclose a transcript suggesting that its crucial trial witness had been coached into giving more believable testimony and that even the investigating officer initially did not believe her. We reasoned that "[w]hile the suppressed transcripts do not contain any earth shattering revelations, they do contain significant evidence that damages the credibility of the prosecution's star witness and undermines critical aspects of the prosecution's theory as to why the death penalty was justified."(fn19).

In White, it was much clearer from the video recording that the victim had complete contempt for the State's interference with her private life, and she wanted nothing to do with its investigators. The police reports

did not come close to reflecting the "victim's" hostility to the State and her taking full responsibility for the defendant's involvement.

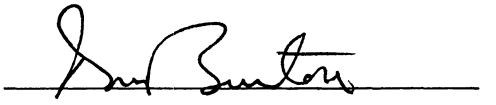
Rule 16)(a)(4) is both procedurally and substantively unfair, for it gives the prosecution untrammeled discretion to decided whether or not the evidence it alone conceals is mitigating to the defendant's guilt. That is not for the prosecution to decide, but for the defense to evaluate. *Brady* is to the contrary, and requires all doubts about the value of the evidence to the defense to be resolved in favor of disclosure, *Berger v. United States*, 295 U.S. 78, 88 (1935). As presently postured, the law gives the State every incentive to withhold evidence and later argue that it was not dispositive anyway.

CONCLUSION

Defendant has suffered a year in prison, two months of it in death row conditions saturated with incessant brain washing coupled with pornographic stimuli recorded by a medieval contraption that can no more diagnose sexual predator proclivities than a divining rod can find water. For the defendant to be so positioned from pleading guilty to conduct not constituting a sex crime, then to be punished for crimes never proved, and last of all, harshly sentenced for daring to raise constitutional violations is monumental claptrap. Swift action should be taken to root out such torture and to curb official hysteria over consensual sex by aggressive

mature minor females. CW was right when she charged in the recorded interview: "The law is stupid!"

Dated: January 7, 2009



Thomas M. Burton

CERTIFICATE OF SERVICE

I hereby certify that I sent by United States Mail, postage prepaid, a true and correct copy of the foregoing

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January 8, 2009

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